BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KIMBERLY PENN	)	
Claimant	)	
VS.	)	
	)	Docket No. 231,173
UNITED PARCEL SERVICE	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 22, 1999 Award entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument on May 3, 2000.

APPEARANCES

Stephen J. Jones of Wichita, Kansas, appeared for claimant. John R. Emerson of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Appeals Board, the parties agreed that claimant was entitled to receive three weeks of temporary partial disability benefits as determined by the Judge.

ISSUES

This is a claim for two January 8, 1998 accidents and the resulting back injury. Averaging a 41 percent task loss with a 51 percent wage loss, Judge Clark determined claimant sustained a 46 percent permanent partial general disability. Additionally, the Judge awarded claimant three weeks of temporary partial disability benefits and 48.71 weeks of temporary total disability benefits.

Respondent and its insurance carrier contend Judge Clark erred. First, they contend that claimant is not entitled to receive any temporary total disability benefits as claimant was either working or, according to the opinion of one doctor, had reached maximum medical improvement during the period that the Judge found the temporary total disability benefits payable.

Second, respondent and its insurance carrier contend that claimant sustained no task loss as Dr. Fluter, one of claimant's treating physicians, testified that claimant could do all of the work tasks that she performed for respondent before the January 8, 1998 accidents. They also argue the 41 percent task loss opinion that the Judge used was based upon erroneous information that claimant was required to lift up to 100 pounds rather than 70 pounds while working for respondent. Therefore, they contend that claimant has no task loss and a permanent partial general disability of 25.5 percent, which they compute by averaging a zero percent task loss with a 51 percent wage loss.

Claimant also disagrees with the Judge's findings and conclusions. First, claimant agrees with the respondent and its insurance carrier that the Judge granted temporary total disability benefits for some weeks that claimant was working. Claimant acknowledges that she worked from January 29, 1998, through May 25, 1998, and, therefore, concedes that she is not entitled to receive temporary total disability benefits for that period. But claimant contends that temporary total disability benefits should be paid for all but two days for the period from May 25, 1998, through January 6, 1999. Claimant argues that temporary total disability benefits should be paid for 32 weeks rather than the 48.71 weeks ordered by the Judge.

Second, claimant contends that the evidence establishes a 41 percent task loss as the same tasks are eliminated regardless of whether claimant's maximum lift was 100 pounds or 70 pounds. Because she was not working at the time of the regular hearing, claimant argues that she has a 100 percent wage loss which, when averaged with the 41 percent task loss, creates a 70 percent permanent partial general disability. In the alternative, claimant argues that the 51 percent wage loss is too low as the Judge failed to consider the loss of fringe benefits that she received that were valued at $103.95 per week.

The issues before the Board on this appeal are:

1. What is claimant's task loss?

2. What is claimant's post-injury wage for purposes of determining the permanent partial general disability?

3. What is the nature and extent of claimant's injury and disability?

4. How many weeks of temporary total disability benefits is claimant entitled to receive?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Claimant either strained or sprained her back on January 8, 1998, when she twice slipped on ice and fell. The parties stipulated that the accidents arose out of and in the course of employment with respondent.

2. At the time of the accidents, claimant worked two part-time jobs for respondent. From 9 a.m. to noon, claimant delivered air letters and light packages. From 3:30 p.m. to 8:30 p.m., claimant worked as a counter clerk. Including both jobs, claimant would work 40 hours per week.

3. On the day of the accidents, respondent referred claimant for medical treatment at Riverside Health System where she began treating with Dr. R. Piazza and others.

4. According to claimant, the doctors at Riverside Health System initially restricted her from lifting. At that time, respondent took claimant off the delivery job but permitted her to work the counter job with help from another worker. According to claimant, two or three weeks later the doctors at Riverside Health System released claimant to return to work without restrictions. At that point, claimant recommenced the delivery job, which respondent made lighter by having claimant deliver mostly letters.

5. Respondent removed claimant's counter helper. Performing both jobs without assistance, claimant's symptoms increased and respondent again referred her to Riverside Health System. Claimant continued to work for respondent through May 25, 1998, when Dr. Piazza discharged her from treatment with a 50-pound lifting restriction. Upon learning of the discharge and restriction, respondent advised claimant that it had no work for her as she could not lift 70 pounds.

6. In July 1998, respondent offered claimant a part-time job fueling and washing its delivery trucks. On July 29 and July 30, 1998, claimant worked that job. Because the work aggravated claimant's back, on July 31, 1998, claimant sought additional treatment from her personal physician, Dr. Hai Truong. Because the doctor was not in, claimant saw Dr. Truong's physician assistant who restricted claimant from lifting, pushing, or pulling more than ten pounds.

7. When claimant presented the ten-pound restriction to respondent, the company advised her it had no work for her until the restrictions were lifted.

8. Claimant's attorney referred her to Dr. George G. Fluter, who is board certified in physical medicine and rehabilitation, for an August 25, 1998 examination and evaluation. Dr. Fluter recommended additional physical therapy, a TENS unit, and medications.

9. In September 1998, claimant saw Dr. Truong, who prescribed physical therapy.

10. After an October 1998 preliminary hearing, Dr. Fluter was appointed the treating physician. After a period of physical therapy and heat treatments, the doctor released claimant to return to her regular work as of January 4, 1999. Dr. Fluter testified about claimant's release, in part:

> Well, at that point she had completed the course of physical therapy and made good progress and she felt that she could return to her job and I felt that she could return to her job. And physical examination findings were about the same. She did have some tender areas to palpation but no evidence of neurologic impairment. So I felt that she had improved to the point where she would be able to return to her job at UPS.[1]

According to Dr. Fluter, claimant did not lose the ability to perform any tasks that comprised the work that she did for respondent as she could lift the 70 pounds required by respondent. But the doctor believes claimant sustained a five percent whole body functional impairment rating under the fourth edition of the AMA *Guides to the Evaluation of Permanent Impairment (Guides)* for lumbar strain or sprain and myofascial pain.

11. When claimant returned to respondent with Dr. Fluter's release, respondent refused her work because she was "suing" the company over her back injury. Respondent relented and on January 6, 1999, permitted claimant to return to work placing her in the fueling and washing job as a permanent position. In that job claimant worked approximately four hours per night.

12. One of claimant's duties in fueling and washing trucks was to back and park them in a line leaving approximately one foot between them. Claimant advised her supervisor that she was not proficient in backing the trucks in such close quarters but was told to do so anyway. After damaging one of respondent's trucks on January 29, 1999, and failing to report it, claimant was suspended and then formally terminated as of February 2, 1999, for violating company rules. According to claimant, there was another employee who was also suspended for failing to report an accident. But that individual was permitted to return to work. Claimant appealed the firing, but despite her 19 years with the company, respondent refused to reinstate her.

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[1] Deposition of George Fluter, M.D., October 11, 1999; p. 17.

13. At the time of the July 1999 regular hearing, claimant was unemployed even though she was looking for work and making approximately ten applications per week.

14. When he released claimant to return to work, Dr. Fluter believed claimant could return to her regular job duties as a delivery and counter person. At that time, claimant agreed with the doctor that she could return to her regular job duties. When she testified at the July 1999 regular hearing, claimant continued to believe that she could physically perform the delivery and counter jobs without violating her permanent restrictions.

15. At her attorney's request, claimant saw Dr. Pedro A. Murati on March 15, 1999. Dr. Murati, who is board certified in physical medicine and rehabilitation, diagnosed lumbosacral strain and left sacroiliac joint inflammation that he related to claimant's January 1998 work-related accidents. The doctor determined that claimant had a seven percent whole body functional impairment rating according to the AMA *Guides.* Additionally, the doctor reviewed a May 1998 functional capacity evaluation and used the information contained in that document in formulating claimant's permanent restrictions, as follows:

> . . . a maximum lift would be a foot off the floor of 70 pounds occasionally; a foot off the floor frequently 42; constantly 23; occasional squatting and kneeling; frequent sitting and standing, walking, bending and reaching.[2]

16. Human resources expert Jerry D. Hardin interviewed claimant and prepared a list of the work tasks that she performed in the 15-year period before the January 1998 accidents. Dr. Murati reviewed that list and testified that claimant lost the ability to perform seven of 17, or 41 percent, of the tasks. Considering the entire record, the Appeals Board is persuaded by that testimony and, therefore, finds that 41 percent accurately represents claimant's task loss as a result of the January 1998 accidents.

17. Except for the two days that she worked in July 1998, claimant did not work from May 26, 1998, to January 6, 1999, when she returned to work for respondent fueling and washing delivery trucks. The Appeals Board finds that claimant had not reached maximum medical recovery during that period as evidenced by the fact that both Dr. Truong and Dr. Fluter prescribed additional medical treatment during such period.

18. According to claimant, she was paid $14.96 per hour for the driving job and $18.96 per hour for the counter job. Respondent also provided claimant with health and dental insurance having a value of $447.28 per month.

19. The Judge found claimant's pre-injury average weekly wage was $663.17 and claimant's post-injury average weekly wage was $321.20. The Appeals Board adopts the

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[2] Deposition of Pedro A. Murati, M.D., September 8, 1999; p. 8.

Judge's finding that claimant's pre-injury average weekly wage is $663.17, excluding additional compensation items, and claimant's post-injury average weekly wage was $321.20, excluding additional compensation items, while claimant worked for respondent through approximately January 29, 1999.

20. Claimant's employer-paid insurance benefits terminated on February 20, 1999.

CONCLUSIONS OF LAW

1. The Award should be modified to reduce the number of weeks of temporary total disability benefits to 31.71 and reduce the permanent partial general disability to 43 percent based upon the reduced wage loss that results when the value of employer-paid insurance benefits is included in the pre- and post-injury average weekly wage computations.

2. Because of the back injury, claimant worked only the counter job for approximately three weeks. The Appeals Board concludes, and the parties agree, that claimant is entitled to receive temporary partial disability benefits for that three-week period.

3. After May 25, 1998, respondent did not permit claimant to work. Because claimant had not reached maximum medical improvement and was unable to work, claimant is entitled to receive temporary total disability benefits for all but two days from May 26, 1998, through January 4, 1999, the date that Dr. Fluter permitted her to return to work.

4. Because a back injury is an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides, in part:

> . . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. . . .

But that statute must be interpreted in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability, as contained in K.S.A. 1988 Supp. 44-510e, by refusing to try to perform an accommodated job that the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

5. Claimant was terminated for failing to report an accident. That failure to comply with company rules is the equivalent of failing to make a good faith effort to obtain and retain employment. Therefore, the average weekly wage that claimant was making immediately before she was terminated should be used as claimant's post-injury wage for purposes of computing the wage loss in the permanent partial general disability formula. Therefore, excluding fringe benefits, a post-injury wage-earning ability of $321.20 should be imputed to compute the difference in claimant's pre- and post-injury wages.

6. Excluding employer-paid insurance benefits, claimant's pre-injury average weekly wage was $663.17, which qualifies claimant to receive the maximum weekly temporary total and permanent partial disability benefit for a January 1998 accident, which is $351.

7. Claimant argues that $103.95 should be added to claimant's average weekly wage as that represents the weekly value of the employer-paid insurance benefits that she received while working for respondent. As indicated above, those benefits were terminated in February 1999 after claimant was fired. Adding the value of the insurance to the wages creates a pre-injury average weekly wage of $767.12 ($663.17 plus $103.95) and a post-injury wage of $425.15 ($321.20 plus $103.95). The difference between $767.12 and $425.15 is 45 percent.

8. For purposes of computing this award, claimant's average weekly wage is $663.17 for benefits due and owing through February 20, 1999, when the insurance benefits were

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Copeland*, p. 320.

terminated. After February 20, 1999, claimant's average weekly wage is increased to $767.12 because of the discontinued insurance benefits.[6]

9. As indicated in the findings above, claimant has a 41 percent task loss. Averaging that task loss with the 45 percent wage loss creates a 43 percent permanent partial general disability.

AWARD

WHEREFORE, the Appeals Board modifies the November 22, 1999 Award by reducing the number of weeks of temporary total disability benefits from 48.71 to 31.71 weeks and by reducing the permanent partial general disability from 46 percent to 43 percent.

Kimberly Penn is granted compensation from United Parcel Service and its insurance carrier for two January 8, 1998 accidents and resulting disability. Based upon an average weekly wage of $767.12, Ms. Penn is entitled to receive three weeks of temporary partial disability benefits which, when converted to temporary total, equals 1.08 weeks of temporary total disability benefits at $351 per week, or $379.08, plus 31.71 weeks of temporary total disability benefits at $351 per week, or $11,130.21, plus 170.80 weeks of permanent partial general disability benefits at $351 per week, or $59,950.80, for a 43 percent permanent partial general disability, making a total award of $71,460.09.

As of May 15, 2000, there would be due and owing to Ms. Penn three weeks of temporary partial compensation which, when converted to temporary total, equals 1.08 weeks of temporary total compensation at $351 per week, or $379.08, plus 31.71 weeks of temporary total compensation at $351 per week, or $11,130.21, plus 89.78 weeks of permanent partial compensation at $351 per week, or $31,512.78, for a total due and owing of $43,022.07, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $28,438.02 shall be paid at $351 per week until further order of the Director.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

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[6] See K.S.A. 44-511(a)(2).

Dated this ____ day of May 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
John R. Emerson, Kansas City, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director